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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM E. SMITH
Petitioner

VS.

STATE OF INDIANA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FOURTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A PRIVATE INDIVIDUAL CAN BE CRIMINALLY PROSECUTED FOR MERELY ASSERTING HIS FIFTH AMENDMENT PRIVILEGE NOT TO PRODUCE RECORDS HE MIGHT HAVE IN HIS POSSESSION IN RESPONSE TO A STATE AGENCY'S ADMINISTRATIVE SUBPOENA ISSUED TO FURTHER AN ONGOING CRIMINAL INVESTIGATION OF THE INDIVIDUAL, WITHOUT EITHER THE INTERVENTION OF A NEUTRAL AND DETACHED MAGISTRATE BEFORE THE INSTITUTION OF A CRIMINAL PROSECUTION OR THE OPPORTUNITY TO RAISE HIS GOOD FAITH ASSERTION OF HIS FIFTH AMENDMENT PRIVILEGE AS A DEFENSE TO THE CRIMINAL CHARGES.

PARTIES TO THE PROCEEDINGS IN THE INDIANA COURT OF APPEALS AND THE INDIANA SUPREME COURT

1. Petitioner, William E. Smith

2. Respondent, the State of Indiana

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The opinion of the Indiana Court of Appeals for the State of Indiana whose opinion is herein sought to be reviewed, was rendered March 26, 1992. This opinion is reported at 588 N.E.2d 1303.

STATEMENT OF JURISDICTION

The opinion of the Indiana Court of Appeals that upheld the Petitioner's criminal conviction in the Circuit Court of Pulaski County, Indiana, was rendered on March 26, 1992. Petitioner, William E. Smith, timely moved for a rehearing, which petition was denied without opinion on May 11, 1992. Petitioner, William E. Smith, then timely filed a Petition to Transfer with the Indiana Supreme Court, which petition was denied without opinion by that Court on July 2, 1992.

This petition is being filed within ninety (90) days of that date, in accordance with Rule 13.1 of the Rules of the Supreme Court. This Honorable Court has

jurisdiction over this proceeding pursuant to Title 28 United States Code, Section 1257 and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

INDIANA STATUTES

I.C. 6-3-6-11 - Appendix D, pg. 13a
I.C. 6-8.1-5-4 - Appendix E, pg. 14a
I.C. 6-8.1-3-12 - Appendix F, pg. 15a

STATEMENT OF THE CASE

Prior to July 18, 1989, the Indiana Department of Revenue began a criminal investigation of Petitioner, William Smith, a private individual, because their records indicated that he had not filed tax returns for several years. Criminal investigators obtained an administrative subpoena duces tecum (Appendix G, pg. 16a) and went to Petitioner's home on July 18, 1989, and served it with the intent to make a prosecutable case against him.

The subpoena directed Petitioner Smith to produce originals or legible copies of books, accounts, Forms W-2, Forms 1099, receipts, invoices, cancelled checks and any other records necessary to determine the Indiana income tax liability of Petitioner Smith and his wife for the period from January 1, 1984, to December 31, 1988. The subpoena directed the Petitioner and his wife to produce the records at their

residence on August 7, 1989, by 11:00 A.M.

The Petitioner inquired about the criminal investigators' purpose in wanting his records and asked if he was being accused of a crime. He was told, "No, not yet." At Petitioner's trial the chief criminal investigator admitted that he was heading up a criminal investigation for the criminal division of the Indiana Department of Revenue targeting Petitioner Smith when he obtained the subpoena and served it.

When the criminal investigators returned to Petitioner's home to collect the documents on August 7, 1989, Petitioner Smith did not turn over any records and told the investigator that he thought any papers he had were private and that he felt he had a right to keep them private. Petitioner Smith then asserted his rights under the Indiana Constitution and the Fifth Amendment to the United States Constitution not to produce any records.

When Petitioner Smith asserted his

Fifth Amendment privilege not to produce documents the criminal investigators asked him to sign a written refusal. They then read him his Miranda warnings. When Petitioner Smith said that he wanted to talk to an attorney before signing anything, the agents left.

Petitioner Smith heard nothing further from the State until November 30, 1989, when he was arrested pursuant to criminal charges that had been filed against him in the Pulaski County, Indiana, Circuit Court. He was charged with the felony of knowingly failing to permit the examination of any book, paper, account, record, or other data by the Department of Revenue or its authorized agents pursuant to I.C. 6-3-6-11. He was also charged with not keeping records. Petitioner was found not guilty of not keeping records, but was found guilty of knowingly failing to allow the examination of records by the Department of Revenue.

After Petitioner Smith asserted his

Fifth Amendment privilege, the State sought no judicial review of the Petitioner's assertion of the Fifth Amendment privilege or judicial enforcement of the subpoena, although an Indiana statute gave them that power. (See Appendix F, pg. 15a). In fact, the subpoena referred to the statute on its face. In addition, the criminal investigators told Petitioner Smith that they would, if necessary, take him to court and get an order to make him comply. At trial and on appeal the State took the position that judicial intervention was merely an option for them and that instead they had elected to bypass civil proceedings altogether and had criminal charges filed against Petitioner Smith because he had, by asserting his Fifth Amendment privilege, committed the felony of not turning over records as requested by the Indiana Department of Revenue.

When criminal charges were subsequently filed against Petitioner Smith,

he obtained an attorney. At his trial Petitioner Smith denied that he had records and tried to raise the Fifth Amendment and his good faith assertion of that privilege as a defense. (See Appendix H, 18a). The trial court refused any such instruction to the jury and told the jury over Petitioner Smith's Fifth Amendment objections (see Appendix I, 20a) that:

> "A person does not have a right to refuse to produce records, required to be kept, under the self-incrimination provisions of the Constitutions of the United States and the State of Indiana."

The Petitioner was convicted. The sentence was stayed pending his appeal. The Petitioner appealed to the Indiana Court of Appeals. The Court of Appeals in a written opinion (Appendix A, pg. 1a) upheld the conviction stating that the records sought in the subpoena were "required records" under the Indiana tax code provisions, (see Appendix E, pg. 14a) and, that therefore, the Petitioner had no privilege under the

United States or Indiana Constitutions not to produce the documents, even though the act of producing them could incriminate him. The Court of Appeals did not discuss the State's admission that the records were being sought to prosecute Petitioner Smith.

The Indiana Court of Appeals bypassed the above issues and said that because an Indiana statute requires a person subject to a tax to keep "books and records" and produce them when requested, the Fifth Amendment is not applicable, since the statute converts any books and records into "required documents".

Specifically the Indiana Court held in relevant part as follows:

> "Smith contends he had a constitutional right under the Fifth Amendment of the United States Constitution and Article I, Sections 11 and 14 of the Indiana Constitution to refuse to turn over his tax records to a government agency. Smith further contends the trial court erred in refusing to instruct the jury he had such a right. He cites U.S. v. Doe (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552, in support of his contention.

In Doe, the supreme court held that although the contents of a document might not be privileged, the act of producing the document may be. 104 S.Ct. at 1242. The court reasoned the production of documents may be testimonial and incriminating when it concedes "the existence of papers demanded and their possession or control by the taxpayer." Id. (citing Curico v. United States (1957), 354 U.S. 118, 125, 77 S.Ct. 1145, 1150, 1 L.Ed.2d 1225). However, as noted in In Re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985 (2nd Cir. 1987), 793 F.2d 69, 73, Doe did not involve the production of required records. Thus, Doe did not place limitations upon the "required records" exception to the Fifth Amendment, an exception which allows the government to demand the production of records which are required to be kept by statute. Two Grand Jury Subpoenae at 73.

Three other states have found the "required records" exception requires production of tax records. In Ex Parte Klingler (Ala. 1983), 438 So.2d 307, a pre-Doe case, the Supreme Court of Alabama declined the taxpayer's invitation to stop the Department of Revenue's "despotic inquisition", and held that tax records required to be kept by statute must be produced upon demand by the State. In Siegel v. New Jersey Division of Taxation (1986), 208 N.J. Super. 588, 506 A.2d 776, cert. denied,

105 N.J. 568, 523 A.2d 199, the Division of Taxation moved to enforce a subpoena requiring production of sales records of a sole proprietor who was suspected of possible violations of the sales tax statutes. The trial court ordered compliance with the subpoena and the taxpayer appealed. The New Jersey appellate court noted the limitations of the Supreme Court's decision in Doe, and held the "required records" exception required compliance with the subpoena. The court reasoned required records are "already known to exist, thereby removing any notion of compelled testimony through their production." Id. at 778 (quoting State v. Stroger (1984), 97 N.J. 391, 406-407, 478 A.2d 1175). The South Dakota Supreme Court, in the recent decision of State of South Dakota v. Reif (S.D. 1991) ____ N.W.2d _____, also held the production of required records does not constitute self-incrimination on the part of the taxpayer required to keep the records.

In the instant case, Smith does not dispute that the records demanded by the Department in its subpoena were required to be kept under IC 6-3-6-10 and IC 6-8.1-5-4. As required records, they were not privileged under the Fifth Amendment or Indiana's Constitution. The trial court did not err in refusing to direct a verdict in Smith's favor or in refusing to instruct the jury that he had a right to refuse

production of the records sought.

> Smith contends the trial court also should have directed a verdict in his favor because there was no evidence any records ever existed. Smith further contends the trial court compounded this error by giving an erroneous instruction to the jury concerning the elements of the offense."

Because the written opinion issued by the Court of Appeals upheld the Petitioner's conviction and that decision was subsequently upheld by the Indiana Supreme Court, without a written opinion, Petitioner has filed this Petition for a Writ of Certiorari.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE INDIANA COURT OF APPEALS CONTRAVENED DECISIONS OF THIS COURT AND OTHER FEDERAL DECISIONS

The Indiana Department of Revenue, as part of a criminal investigation of Petitioner Smith, issued a subpoena duces tecum directing him to produce documents for them. Petitioner Smith asserted his Fifth

Amendment privilege not to produce any papers he might have in his possession. He also denied that any documents existed. The State filed criminal charges against him because he asserted the privilege.

No hearing on the validity of the subpoena was held, nor was any hearing held to determine if Petitioner Smith's assertion of the privilege was appropriate.

The Petitioner was tried and convicted for not producing the documents. The Court at Petitioner Smith's trial refused to instruct the jury on the Fifth Amendment privilege and the good faith assertion of that privilege as a defense to the criminal charges, even though the government agents admitted at trial: (1) that the Indiana Department of Revenue was seeking to prosecute Petitioner Smith for not filing tax returns, and, (2) that they served their subpoena on him to further that prosecution.

The decision of the Indiana Court of

Appeals approving the conduct of the criminal investigators contravened recent decisions of this Court. See U.S. v. Doe (1984) 465 U.S. 605, 104 S.Ct. 1237, and Braswell v. U.S. (1988) 487 U.S. 99. The trial court's refusal to recognize the Fifth Amendment and Petitioner Smith's good faith assertion of it as a defense contravened the holdings and dicta of this Court in Garner v. U.S. (1976) 424 U.S. 648.

This Court in U.S. v. Doe clearly enunciated the principle that even though the content of a document in a person's possession may not be protected by the Fifth Amendment, the act of producing that document is testimonial in nature and is protected under the Fifth Amendment. See U.S. v. Doe 104 S.Ct. at 1242. Implicit in the decision in U.S. v. Doe was a hearing process to review the validity of the assertion of the Fifth Amendment privilege.

This Court in Braswell said that an individual who was the sole owner of a

corporation did not have the same protections as a private individual when subpoenaed to produce records saying:

> "Had the petitioner conducted his business as a sole proprietorship, Doe would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination." Braswell, 108 S.Ct. at 2288.

Petitioner Smith had no attorney prior to the criminal charges being filed against him. He was never warned or advised by the government of his right to challenge the administrative subpoena. It did not appear that he needed to challenge it, since the officers left his home when he asserted his Fifth Amendment privilege.

At Petitioner's criminal trial he challenged the procedures used by the State. The State's trial testimony supported his assertion of the privilege, since the criminal investigators obtained and served the subpoena on the Petitioner to further their criminal investigation of him. See

Garner v. U.S. (1976) 424 U.S. 648, 96 S.Ct. 1178. See also U.S. v. Davis (5th Cir.) 636 F.2d 1028, cert. denied; and U.S. v. Jones (10th Cir. 1983), 703 F.2d 473, 477-78 (citing U.S. v. Davis for authority that the trial court must utilize a traditional Fifth Amendment analysis to determine if the requested information will "tend to incriminate the witness" and not whether a prosecution is likely to occur); and U.S. v. Goodwin (5th Cir. 1980) 625 F.2d 693, 700 (Fifth is applicable if defendant has reasonable cause to apprehend danger from his answer).

Several other Federal decisions have upheld an individual's right to assert the Fifth Amendment privilege not to produce documents subpoenaed by a governmental agency, when to do so could reasonably be expected to incriminate him or her. U.S. v. Duncan (N.D. Ill., E.D. 1989) 704 F.Supp. 820 (citing Braswell for requiring opportunity to demonstrate justification for

asserting Fifth); U.S. v. Cates (D.Md. 1988) 686 F.Supp 1185 (government and IRS brought action to require self-employed physician who had not filed tax returns to show cause why he had not complied with their subpoena by asserting the Fifth); and U.S. v. Harper (E.D. Penn. 1975) 397 F.Supp 983. A 1992 Ohio Supreme Court decision follows this same line of reasoning. See Cincinnati v. Bawtenheimer (Oh. 1992) 586 N.E.2d 1065.

The total denial of Petitioner Smith's right to exercise his Fifth Amendment privilege before, during, and at the conclusion of his trial was contrary to the established authority of this Court, the Fifth Amendment of the United States Constitution, and other federal decisions and is a compelling reason for this Court to grant certiorari in this proceeding.

2. THE INDIANA COURTS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DEFINITIVELY DECIDED BY THIS COURT AND THEY HAVE DONE SO IN A WAY THAT CONTRAVENES THE PURPOSE OF THE FIFTH AMENDMENT AND THE INTENT OF CASES DECIDED BY THIS COURT.

When Petitioner Smith asserted his Fifth Amendment privilege in response to an administrative subpoena, he was prosecuted for doing so under state law even though the government sought the records to support a criminal prosecution of him. A pre-prosecution judicial hearing was not provided to Petitioner Smith to determine if his assertion of the Fifth Amendment privilege was appropriate in response to the government's administrative subpoena. Petitioner Smith at his trial was also denied the right to raise his good faith assertion of the Fifth Amendment privilege as a defense to a criminal prosecution charging him with not producing the documents for the government.

The administrative agency admitted at trial that they were seeking Petitioner

Smith's records to promote and assist a criminal prosecution of him because their records indicated he had not filed a tax return for several years. Petitioner Smith was deliberately prosecuted for not producing documents and convicted of that crime solely because of his pre-trial assertion of the Fifth Amendment privilege to a criminal investigator wanting to prosecute him. Petitioner Smith's position is that the mere assertion of a constitutional right should not be a crime and that the government's use of the administrative subpoena to promote a prosecution of him was, therefore, unconstitutional.

Petitioner Smith was faced with the prospect of either complying with the government's subpoena and possibly helping them to prosecute him or exercising his Fifth Amendment privilege and being prosecuted for doing so. Further, if he denied having records he could be found

guilty of the crime of not keeping records. Typically, in circumstances like those that confronted Petitioner Smith, one of two things happens, either the administrative agency goes to court to get a court order compelling compliance with their subpoena under the threat of a contempt order, or the citizen files a motion with a court to quash the subpoena. In both circumstances a hearing is held before a neutral and detached magistrate to determine if there is a basis for the citizen's raising of the Fifth Amendment privilege. U.S. v. Doe, supra, and Braswell v. U.S., supra, both arose when the party subpoenaed filed to quash the subpoena, and In Re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985 (2nd Cir. 1986) 793 F.2d 69, the government filed a motion to compel compliance with their subpoena.

In Petitioner's case he was served with the subpoena and raised the Fifth, but he had no attorney and did not move to

quash the subpoena. The government advised Petitioner Smith that they would take him to court and get a court order to force him to comply with their subpoena, and the subpoena itself referred to the Indiana statute that gave the administrative agency the authority to go to court. The government did not do what they and their documents said they would do. Instead the government, made a deliberate decision to immediately prosecute Petitioner Smith for the crime of not producing records. This procedure avoided the necessity of preparation of a case against the Petitioner under the government's theory that all they had to show was that their subpoena was served and that he refused to produce.

The trial court, during and at the end of the trial, refused Petitioner Smith's motions to dismiss the charges based on the fact that he had asserted his Fifth Amendment privilege in good faith. Petitioner-Smith's conviction became a

foregone conclusion when the trial court, over Petitioner's objections, instructed the jury:

> "A person does not have a right to refuse to produce records, required to be kept, under the self-incrimination provisions of the Constitutions of the United States and the State of Indiana." Trial Court's Instruction #7.

This Court in Garner v. U.S. (1976) 424 U.S. 648, 96 S.Ct. 1178, discussed in dicta a series of federal statutes dealing with the IRS which are substantially similar to the Indiana statutes used to prosecute Petitioner Smith. This Court said on that occasion that there was no constitutional right to a pre-criminal prosecution hearing where the person in Petitioner Smith's position could have a judicial determination on the legality of the subpoena, the agency's intentions, and whether or not the person's assertion of the Fifth Amendment privilege was appropriate. See Garner 424 U.S. at 662-665. This Court and the government representatives agreed in Garner

that such a preliminary hearing would serve the interests of all if followed, but the Constitution did not require such a hearing. No pre-prosecution hearing was required per this Court in Garner with the following qualification:

> "As long as a valid and timely claim of privilege is available as a defense to a taxpayer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim." Garner 424 U.S. at 665.

This Court in Doe supra, implied that a hearing was involved when a person asserted the Fifth, but Doe arose in a civil setting because the party subpoenaed by a grand jury had filed a motion in a district court to quash the subpoenas. When this Court discussed the Doe decision in Braswell v. U.S. this Court held that:

> "Had the petitioner conducted his business as a sole proprietorship, Doe would require, that he be provided the opportunity to show his act of producing would entail testimonial self-incrimination."

It is not clear from reading Garner, Doe, and Braswell whether a person's opportunity to show that his act of producing would probably entail testimonial self-incrimination would now be constitutionally required at either a pre-prosecution hearing or at trial. It does appear from these decisions that it is the intent of this Court that the Fifth Amendment privilege can be successfully raised if it is asserted in good faith at either a pre-prosecution hearing or as a defense at a criminal trial. See also U.S. v. Goodwin (5th Cir. 1980) 625 F.2d 693, 700-701 (Fifth Amendment claims are to be judged by the court who must inquire into the legitimacy and scope of the witness' assertion of his Fifth Amendment privilege).

Several courts have noted that, although routine tax investigations may be commenced as a civil action for purposes other than criminal prosecutions, they frequently lead to criminal prosecutions.

Also, as in Petitioner's case, the civil procedures can be instituted to promote the prosecution of a private individual, so that it becomes critical that a neutral and detached magistrate be interjected to protect the interests of the government and of the private individual. This Court pointed out in Garner the importance of a procedure for protecting a citizen's right to assert the Fifth Amendment privilege:

> ". . .the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment - the preservation of an adversary system of criminal justice. See Tehan v. Un. Sts. ex rel. Shott 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459 (1966). That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures." Garner, 424 U.S. 655-6.

Under the facts of this case this Court can clarify that a civil hearing is constitutionally required before a criminal prosecution can be filed against a person accused of not producing documents, when

that person has merely asserted the Fifth Amendment privilege in response to an administrative subpoena. In the alternative, this Court can clearly establish as a defense the good faith assertion of the Fifth Amendment privilege in response to a governmental subpoena when the person is then criminally charged with the non-production of documents. If the good faith assertion of the privilege is clearly established as a defense, the government will not be as likely to seek a forced waiver of the Fifth with the threat of a criminal prosecution. Of greater importance, the good faith assertion of the Fifth Amendment should not be a crime, nor should the government be allowed to compel the waiver of the Fifth Amendment privilege under the threat of a prosecution for asserting it.

Clarification of these issues that frequently arise in tax proceedings is a compelling reason to grant certiorari.

3. THE INDIANA COURTS MISAPPLIED THE "REQUIRED DOCUMENTS" EXCEPTION TO THE FIFTH AMENDMENT TO DESTROY THE FIFTH AMENDMENT'S PROTECTIONS.

The Indiana Court of Appeals found that the Defendant had no Fifth Amendment privilege not to produce documents because Indiana statutes required the keeping of "books and papers" which were to be produced upon request by the department of revenue. Thus, the Court of Appeals found that any records in Petitioner Smith's possession were "required records" and, therefore, not protected by the Fifth Amendment privilege. This interpretation misapplies and misinterprets the "required records" exception as established in a series of cases decided by this Court. See Davis v. U.S. (1946) 328 U.S. 582, 66 S.Ct. 1256; U.S. v. Darby (1941) 312 U.S. 100, 61 S.Ct. 451; Shapiro v. U.S. 335 U.S. 1, 68 S.Ct. 1375; and Grosso v. U.S. (1968) 390 U.S. 62, 88 S.Ct. 709.

From the above cases it is apparent

that the concept of "required documents" is to be narrowly drawn as an exception to the Fifth Amendment privilege. For the exception to apply, three requirements must be met: First, the purposes of the government's inquiry must be essentially regulatory, not the promotion of a criminal prosecution; second, the records must contain the type of information that the regulated party would ordinarily keep; third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents. See Shapiro, supra.; and Grosso, supra. All three requirements must be met for a document to be a "required record" and its production exempted from the privilege against self-incrimination in the United States Constitution. See Grosso, supra, 88 S.Ct. at 713.

The "required records" exception was never a proper issue in Petitioner Smith's case because no pre-prosecution hearing was

held; at his trial Petitioner Smith denied that any records existed, including any "required documents"; and a hearing was not conducted by the Court at trial to determine if Petitioner's assertion of the Fifth was appropriate. The State's own witnesses admitted at trial that their request for the documents was to promote a criminal prosecution, not to regulate a trade or business. The whole issue of "required documents" was never presented to a judge or jury for proper determination under Doe, Braswell and Garner. The trial court and the Indiana Court of Appeals presumed that all records were "required documents" because of the Indiana statutes. The jury, over Petitioner Smith's objections, was so advised.

Tax collection proceedings are not an appropriate place to utilize and apply the "required documents" exception, particularly when the record gathering statutes of a tax collection scheme are

being used to gather evidence to prosecute a private individual from whom the records are sought. The Fifth Amendment's purpose is to protect an individual from this type of government conduct.

This Court should grant certiorari to clarify the use of the "required documents" exception to the Fifth Amendment and determine when and how it is to be challenged by a person being prosecuted for not producing documents sought by the government.

CONCLUSION

WHEREFORE, this Court is respectfully urged to enter an order granting Petitioner, William E. Smith's, petition for a writ of certiorari to the Indiana Supreme Court and Indiana Court of Appeals.

Respectfully submitted,

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APPENDIX

William E. SMITH, Appellee-Plaintiff.
No. 66A04-9105-DR-151.

Court of Appeals of Indiana,
Fourth District.

March 26, 1992.

Rehearing Denied May 11, 1992.
Transfer Denied July 2, 1992.

Kelly Leeman, Logansport, for appellant-defendant.

Linley E. Pearson, Atty. Gen., Arthur Thaddeus Perry, Deputy Atty. Gen., Indianapolis, for appellee-plaintiff.

CONOVER, Judge.

Defendant-Appellant, William E. Smith appeals his conviction for Failure to Permit Examination of Records, a class D felony. IND. CODE 6-3-6-11; IC 35-50-2-7.

We affirm.

Smith raises the following issues for our review:

1. whether the trial court erred in refusing to instruct the jury that Smith has a constitutional right to refuse to

turn over incriminating records,

2. whether there was sufficient evidence to establish the existence of records, and

3. whether the trial court erred in allowing the State's witness to refer to Smith's failure to file tax returns.

In 1989, John Pavlakovic, an investigator for the Indiana Department of Revenue, received information from the Department indicating Smith, a farmer, and his wife, had not filed tax returns since 1981. Pavlakovic and Special Agent Rick Albrecht subsequently served Smith and his wife with a subpoena duces tecum issued by the Department.[1] The subpoena called for the production of "[b]ooks, accounts, Forms W-2, Forms 1099, Receipts, Invoices, Cancelled checks and any other records

1. At the time the subpoena was served, Pavlakovic would have accepted payment without any criminal repercussions. (R. 481).

necessary to determine the Indiana Adjusted Gross Income Tax Liability of William E. and Beverly K. Smith, as required by IC 6-8.1-5-4." (R. 447).[2]

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2. IC 6-8.1-5-4 states:

(a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

(1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or

(2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.

In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

Smith refused to comply with the subpoena and asserted a constitutional right to privacy. The State subsequently charged Smith and his wife with Failure to Maintain Records and Failure to Permit Examination of Records. A jury found Smith not guilty of the first offense and guilty of the second. Smith's wife was found not guilty on both counts.

Additional facts will be discussed below as necessary.

Smith contends he had a constitutional right under the Fifth Amendment of the United States Constitution and Article I, Sections 11 & 14 of the Indiana Constitution to refuse to turn over his tax records to a government agency. Smith further contends the trial court erred in refusing to instruct the jury he had such a right. He cites U.S. v. Doe (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552, in support of his contention.

In Doe, the supreme court held that although the contents of a document might not be privileged, the act of producing the document may be. 104 S.Ct. at 1242. The court reasoned the production of documents may be testimonial and incriminating when it concedes "the existence of papers demanded and their possession or control by the taxpayer." Id. (citing Curico v. United States (1957), 354 U.S. 118, 125 77 S.Ct. 1145, 1150, 1 L.Ed.2d 1225). However, as noted in In Re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985 (2nd Cir.1986), 793 F.2d 69, 73, Doe did not involve the production of required records. Thus Doe did not place limitations upon the "required records" exception to the Fifth Amendment, an exception which allows the government to demand the production of records which are required to be kept by statute. Two Grand Jury Subpoenae at 73.[3]

3. In Doe, supra, the court explicitly

Three other states have found the "required records" exception requires production of tax records. In Ex Parte Klinger (Ala.1983), 438 So.2d 307, a pre-Doe case, the Supreme Court of Alabama declined the taxpayer's invitation to stop the Department of Revenue's "despotic inquisition", and held that tax records required to be kept by the statute must be produced upon demand by the State. In Siegel v. New Jersey Division of Taxation (1986), 208 N.J.Super. 588, 506, A.2d 776, cert. denied, 105 N.J. 568, 523 A.2d 199, the Division of Taxation moved to enforce a

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stated the case concerned only "business documents and records not required by law to be kept or disclosed to a public agency." 104 S.Ct. at 1239, n.3. Doe did not appeal the District Court's order to produce required records such as W-2 statements or tax returns. Id.

Post-Doe cases discussing Doe's effect upon the exception include In Re Grand Jury Proceedings (9th Cir.1986), 801 F.2d 1164; and Grand Jury Subpoena Duces Tecum, Underhill (6th Cir. 1986), 781 F2.d 64, cert. denied, 479 U.S. 813, 107 S.Ct. 64, 93 L.Ed.2d 23.

subpoena requiring production of sales records of a sole proprietor who was suspected of possible violations of sales tax statutes. The trial court ordered compliance with the subpoena and the taxpayer appealed. The New Jersey appellate court noted the limitations of the Supreme Court's decision in Doe and held the "required records" exception required compliance with the subpoena. The court reasoned records are "already known to exist, thereby removing any notion of compelled testimony through their production." Id. 506 A.2d at 778 (quoting State v. Stroger (1984), 97 N.J. 391, 406-407, 478 A.2d 1175). The South Dakota Supreme Court, in the recent decision of State of South Dakota v. Reif (S.D.1991), 478 N.W.2d 815, also held the production of required records does not constitute self-incrimination on the part of the taxpayer required to keep the records.

In the instant case, Smith does not dispute that the records demanded by the Department in its subpoena were required to be kept under IC 6-3-6-10 and IC 6-8.1-5-4.[4] As required records, they were not privileged under the Fifth Amendment or Indiana's Constitution. The trial court did not err in refusing to direct a verdict in Smith's favor or in refusing to instruct the jury that he had a right to refuse production of the records sought.

Smith contends the trial court also should have directed a verdict in his favor because there was no evidence any records ever existed. Smith further contends the trial court compounded this error by giving an erroneous instruction to the jury concerning the elements of the offense.

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4. The Department of Revenue does not have the unlimited authority to compel production of all records and papers kept by a taxpayer. Therefore, a taxpayer, if he so desires, has the right to receive an in camera inspection of records for a determination as to which records fall within the "required records" exception. See, Klingler, supra, at 310.

Albrect testified at the trial that Smith had stated "his papers were private" and he had the right to "keep them private." Pavalokavic also testified about Smith's stated concerns that the records, if submitted to the State, might eventually end up in the hands of the Internal Revenue Service. (R. 539). This testimony was sufficient to allow the jury to find there were records in existence which Smith would not allow the Department to examine. Accordingly, the trial court did not err when it refused to direct a verdict for Smith.[5]

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5. The trial court instructed the jury the charge of Failure to permit Examination must be supported by proof of a knowing failure "to permit the examination of any book, paper, account, record, or other data by the Department of Revenue or its authorized agents". (R. 706). Smith contends the instruction failed to require the jury to find the records actually existed. The court did not err in giving this instruction as it tracks the language of the statute defining the offense.

Finally, Smith contends the trial court erred in allowing Pavlakovic to testify he received information from the Audit Division concerning Smith's failure to file tax returns. He contends this testimony was both hearsay and prejudicial. Hearsay evidence may be admitted for the purpose of explaining why a government official took a particular course of action. Johnson v. State (1988), Ind., 530 N.E.2d 1179, 1181. Pavlakovic's testimony regarding the information on Smith's failure to file tax returns was offered as the basis for Pavlakovic's subsequent investigation. It was admissible for this purpose. Accordingly, the trial court did not err in allowing the protested testimony.

Affirmed.

CHEZEM and STATON, JJ., concur.

STATE OF INDIANA (SEAL)

CLERK OF THE SUPREME COURT, INDIANAPOLIS

COURT OF APPEALS AND TAX COURT 46204

DWAYNE M. BROWN, CLERK TELEPHONE

217 STATE HOUSE 317-232-1930

WILLIAM KELLY LEEMAN

1300 EAST BROADWAY

LOGANSPORT, INDIANA 46947-0000

CAUSE NO. 66A04-9105-CR-00151

LOWER CAUSE 66C018911CF36A

SMITH, WILLIAM E. -V- STATE OF INDIANA

You are hereby notified that the COURT OF APPEALS has on this day 5/11/92 APPELLANT'S PETITION FOR REHEARING DENIED WESLEY W. RATLIFF, JR., CHIEF JUDGE. AA WITNESS my name and the seal of said Court, this 11th day of May, 1992.

/s/ Dwayne Brown
Clerk Supreme Court,
Court of Appeals and
Tax Court

STATE OF INDIANA (SEAL)

CLERK OF THE SUPREME COURT INDIANAPOLIS,

COURT OF APPEALS AND TAX COURT 46204

DWAYNE M. BROWN, CLERK TELEPHONE

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CAUSE NO. 66A04-9105-CR-00151

LOWER CAUSE 66C018911CF36A

SMITH, WILLIAM E. -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 7/02/92 APPELLANT'S PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR. KM

WITNESS my name and the seal of said Court, this 2nd day of July, 1992.

/s/ Dwayne Brown
Clerk Supreme Court, Court of Appeals and Tax Court

6-3-6-11 Evasion of tax; offenses; prosecution

Sec. 11. (a) ...It is a Class D felony for a person to knowingly fail to permit the examination of any book, paper, account, record, or other data by the department or its authorized agents, as required by this article... or to knowingly refuse to offer testimony or produce any record as required by this article...

6-8.1-5-4 Books and records; federal returns; inspection

Sec. 4. (a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records...

(c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times...

6-8.1-3-12 Audits; appraisals; investigations; subpoenas; court orders; contempt

Sec. 12. ...(b) For purposes of conducting its audit or investigative functions, the department may:

(1) subpoena the production of evidence;...

The department may serve its subpoenas or it may order the sheriff of the county in which the witness or evidence is located to serve the subpoenas.

(c) The department may enforce its audit and investigatory powers by petitioning for a court order in any court of competent jurisdiction located in the county in which the evidence or witness is located... The petition to the court must state the evidence or testimony subpoenaed, and must allege that the subpoena was served but that the person did not comply with the terms of that subpoena.

(d) Upon receiving a proper petition under subsection (c), the court shall promptly issue an order which:

(1) sets a hearing on the petition on a date not more than ten (10) days after the date of the order; and

(2) orders the person to appear at the hearing prepared to produce the subpoenaed evidence and give the subpoenaed testimony.

If the defendant is unable to show good cause ~~for~~ not producing the evidence or giving the testimony, the court shall order the defendant to comply with the subpoena.

(e) If the defendant fails to obey the court order, the court may punish him for contempt...

INDIANA DEPARTMENT OF STATE REVENUE

NUMBER S89-0070

(SEAL)

IN THE MATTER OF: William E. Smith and
Beverly K. Smith
R.R. #1, Box 28
Monterey, Indiana 46960
Social Security Number:
306-50-3851

SUBPOENA DUCES TECUM

Pursuant to Indiana Code 6-8.1-3-12 the Indiana Department of State Revenue orders

William E. Smith and Beverly K. Smith
R.R. #1, Box 28
Monterey, Indiana 46960

to produce originals or legible copies of the following information:

Books, accounts, Forms W-2, Forms 1099, Receipts, Invoices, Cancelled checks and any other records necessary to determine the Indiana Adjusted Gross Income Tax Liability

of William E. and Beverly K. Smith, as required by IC 6-8.1-5-4.

for the period January 1, 1984 through December 31, 1988

The subpoena shall be answerable by 11:00 a.m. o'clock on the day of August 7, 1989, at R.R. #1, Box 28, Monterey, Indiana 46960

Failure to comply will subject you to court proceedings:

Ordered this 14th day of July, 1989.

John R. Gildea
Commissioner
Indiana
Department of
State Revenue

(SEAL)

by /s/ John R. Gildea

DATE: July 18, 1989

TIME: 11:15 a.m.

DELIVERED TO: Beverly Smith & William Smith

TITLE: Owners of Farm.

ADDRESS: R.R. #1, Box 28

Monterey, Indiana 46960

DEFENDANT'S PROPOSED INSTRUCTION NO. 2 AND 5

Instruction No. 2 in relevant part is as follows:

> In addition, the Defendants have asserted as a defense to the charges that they had a legal right under Article I, Section 11 and Section 14 of the Indiana Constitution and the 4th and 5th Amendments to the United States Constitution not to produce to the Indiana Department of Revenue for inspection any of their books and papers on August 7, 1989, without a hearing by a Court where the Department of Revenue's authority could be challenged and the rights of the Defendants protected.

Instruction No. 5:

> Under the Fifth Amendment to the United States Constitution and Article I, Section 14 of the Indiana Constitution which are coextensive in their application, the State cannot compel a person to produce their documents or papers that are in their possession unless the State petitions the Court for an order granting the Defendant use immunity and such a grant of immunity is granted by the Court. If you find that the Defendant asserted his right not to be compelled to produce such documents, the Defendant is entitled to a verdict of acquittal on Count I charging him with knowingly failing to permit the examination of books, papers, records, accounts or other data required to be kept by I.C. 6-8.1-5-4. You are advised that the State has not sought a grant of immunity for the Defendant.

DEFENDANT'S PROPOSED INSTRUCTION NO. 8

Instruction No. 8:

The Self-incrimination Clause of the Fifth Amendment, which applies to the State through the Fourteenth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Testifying includes such things as the act of producing documents. The United States Supreme Court has long held that the privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Petitioner's Trial Objections
to Court's Instruction.

The Defendant's objections to this instruction are as follows:

> "And I would further incorporate that there has been no evidence to substantiate the giving of any of the instructions by the State numbered 1 through 7, that the Instruction No. 7 given by the Court which says that a person does not have a right to refuse to produce records required to be kept under the self-incrimination provision of the constitution of the United States and the state of Indiana is contrary to Article I, Section 14 of the Indiana Constitution and the 5th Amendment of the United States Constitution. Further, it is contrary to United States v. Doe, 140 S.Ct. 1237; contrary to Kastigar v. U.S., 406 U.S. 441, 32 L.Ed.2d 212, at page 217; Allen v. Illiois, 478 U.S. 364, L.Ed.2d 296; Garner v. U.S., 424 U.S. 648, 47 L.Ed.2d 370; Haskett v. State, 263 N.E.2d 529, 531." (ROP, p. 693).